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84-1295

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GWENDOLYN M. PATTON,

Petitioner,

—v.—

ROBERT POLK THOMSON and WILLIAM S. EDMONDS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Gwendolyn Patton petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit entered in this proceeding on August 20, 1984.

QUESTIONS PRESENTED

(1) Considering this Court's recent opinion in Alexander v. Choate, holding that §504 of the Rehabilitation Act and its implementing regulations reach certain claims of disparate impact discrimination, was petitioner required to show in the District Court that the defendants' refusal to provide reasonable accommodation to her needs as a physically handicapped teacher was motivated by a discriminatory animus?

(2) Is this Court's recent decision in Alexander v. Choate retroactive to all

cases pending direct review at the time of the decision?

(3) Does the doctrine of sovereign immunity as exemplified by the Eleventh Amendment to the United States Constitution bar private actions in federal courts under §504 of the Rehabilitation Act of 1973 against state-supported universities which are recipients of federal funds?

PARTIES TO THE PROCEEDINGS

Petitioner Gwendolyn Patton is a handicapped full-time faculty employee at Alabama State University. Defendant Robert Polk Thomson is Dean of University College, Alabama State University; Defendant William S. Edmonds is Vice-President for Academic Affairs at Alabama State University. Alabama State University was an original defendant to this proceeding but was dismissed pursuant to an order entered by the U.S.

District Court on January 28, 1983. (A copy of that order is attached to this petition as Appendix D.

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OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit issued a Per Curiam decision affirming the decision of the U.S. District Court on August 20, 1984. That Per Curiam affirmance is attached to this Petition as Appendix B. The U.S. District Court issued two opinions in this case. The first opinion was issued on January 28, 1983 and dismissed Alabama State University as a defendant. That opinion is attached to this petition as Appendix D. The second opinion, dated September 15, 1983, dismissed Petitioners' claims under §504 and is attached to this petition at Appendix C. None of the opinions are reported.

JURISDICTION

The decision of the Court of Appeals was entered on August 20, 1984. A petition for rehearing to that Court was denied on October 12, 1984. On December 26, 1984 this Court, per Justice White,

provided a 30-day extension in which this petition was to be filed. See, Patton v. Thomson, et al. A.488. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> §5 - The Congress shall have power to enforce this Article by appropriate legislation.

United States Constitution, Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one

of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

§504 (29 U.S.C. § 794), as amended Pub.L. 95-602, Title I, §§119, 122 (d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

42 U.S.C. §2000d, Pub.L. 88-352,

Title VI, §601, July 2, 1964, 78 Stat. 252:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

Petitioner Gwendolyn Patton is a 41-year old female full-time faculty member at Alabama State University in Montgomery, Alabama. She has been continuously employed at the University since the Spring of 1978 when she was first employed as coordinator and instructor in the freshman orientation program. In the Fall quarter of 1981, petitioner had responsibility for teaching two subjects: freshman orientation and writing lab.

In 1967, before teaching at the university, petitioner was involved in a severe automobile accident which caused

multiple fractures to her left leg. As a result of the accident, petitioner has had numerous surgical operations on her leg. The most recent operation took place on October 13, 1981, and was for the purpose of curing ulcers which had developed because her left leg could not adapt to normal day-to-day movement.[1]

In the Fall of 1981, Petitioner was assigned to teach freshman orientation classes on the first floor of McGehee Hall and writing lab classes on the

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[1] In March of 1969, a bone fusion and transplant operation was necessary because the left leg and ankle fracture resulting from the 1967 accident never healed properly. The surgical procedure left the petitioner with inflexibility of the ankle. The combination of the 1967 accident and subsequent surgeries resulted in the left leg being four inches shorter than the right. Petitioner had been warned that any further damage to the leg would result in amputation. Presently she walks with great difficulty and can only wear custom-made orthopedic shoes.

second floor or Patterson Hall, a building unequipped with an elevator.[2]

In September, 1981, petitioner learned that she was to undergo surgery

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[2]Writing laboratory is a program designed for freshmen students who, as a result of their scores on placement tests, are required to take the writing lab as a supplement to the Freshman English course. (T.T. at 28) Three instructors routinely work in the writing lab, each with a group of 5 to 15 students, assisted at times by a work-study student tutor. There is no team teaching. The resource materials in the lab are all portable and consist primarily of books and papers. The lab is simply one large room, furnished with chairs, tables, carrels and a blackboard. There is no specialized electronic or audio visual equipment. (T.T. at 28-32)

The Freshman orientation program is located on the first floor of McGehee Hall, a building equipped with an elevator. It is housed in a large room, similar to the writing lab, however it contains a good deal of audio visual equipment that is routinely used in the course of instruction. Record players, film projectors, film strip projectors and slide carousel projectors are central to the instruction of freshman orientation and are shared by the six to seven orientation instructors. (T.T. 158-160)

in October. The operation would require subsequent temporary (two week) use of crutches and make the change of buildings and flight of stairs to Patterson Hall extremely difficult. She asked her immediate supervisor in the writing lab whether her writing lab students could temporarily meet on the first floor of McGehee Hall, where Petitioner was already meeting freshman orientation classes.[3] The supervisor at first saw

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[3]At its inception, the writing lab was on the third floor of McGehee Hall, where it remained for three months. The lab was moved to the second floor of McGehee for two months and then to the first floor and finally to the second floor of Patterson, where it was in 1981.

The parties agree that ideally, the lab would be on the first floor where it would be more accessible to students in general, should they wish to drop in for tutoring sessions, and to handicapped students and faculty alike. (T.T. at 234: Dr. Clifford Bibb testimony. Dr. Bibb is Chair of the ASU Department of Advancement Studies and the first

(Footnote Continued)

"no harm" with this plan. (T.T. at 183, 207) Some of petitioner's students were in both of her classes and it did not appear to be a disruption of the students' program. There were empty classrooms on the first floor of McGehee that could have been used. (Stipulated in Trial Transcript at 242.) Otherwise, petitioner would be required to go up and down the 38 steps of Patterson Hall, get into her car and drive to McGehee Hall three times a day, twice a week[4].

(Footnote Continued)
director of the writing lab at ASU. Also see T.T. at 86, testimony of petitioner.)

[4]On Tuesday and Thursday, Petitioner was scheduled to teach at 9 A.M. to 10 A.M. in the writing lab on the second floor of Patterson Hall, then from 10 to 11 A.M on the first floor of McGehee Hall and then from 11 to 5 P.M. in Patterson Hall. On Monday, Wednesday and Friday, petitioner's classes and office hours were all on the second floor of Patterson Hall. (T.T. 61-62)

On October 11, 1981, Petitioner made a request by letter to teach her writing lab students in McGehee Hall. (T.T. 53-54) In a letter dated October 15, Dr. Thomson, Dean of University College, refused her request. Upon receipt of Dr. Thomson's refusal, Petitioner appealed to Dr. William Edmonds, Vice President of Academic Affairs, to consider her request "given the fact that no special equipment is used in the writing lab and that the student-teacher learning interaction is the primary teaching tool." (T.T. 55-56) Dr. Edmonds also refused and Petitioner further appealed to Dr. Robert Randolph, the President of the University, in a letter dated October 19, 1981. (T.T. 57)

The University also refused Petitioner's request. It concluded that students must "know the permanent location of the writing lab so as to facilitate their access thereto in the

event of a temporary need." Patton v. Thomson, App. C at 8.

The University was unwilling to allow the temporary relocation of lab students because (1) the materials needed to be "centrally located since, if some were in one place and some in another there would necessarily be shortages occurring between the two locations". App.C at 8 and (2) "transferring materials back and forth would be troublesome and would possibly cause a time loss in affording proper instruction to students." App. C at 13.

The University, however, offered to provide accommodation for petitioner. It offered to provide "two security officers who would come in and take plaintiff bodily in her wheelchair up and down the stairs for at least one entrance and departure each day so that she would not have to climb the stairs." App. C at 10.

On October 19, Petitioner's first day back to work after surgery of October 13, 1981, Petitioner was met by two security guards who carried her in a wheelchair up the steps of Patterson Hall. The experience was difficult physically and emotionally for both Petitioner and the guards. Petitioner was frightened they would drop her, and that her "legs would get smashed all over again . . . . The whole question of amputation is very, very real." (T.T. 66) The guards, untrained in medical transport, also testified that they were uneasy about performing this job. (T.T. at 255, 258-260)

The guards never returned at 11 A.M. to transport Petitioner to her next class, nor did they ever return on subsequent days. Petitioner had submitted a schedule of her classes and also telephoned the security office daily

to inform them that she was on her way and would require transport. Each day until November 2, 1981, when she was no longer on crutches. Petitioner waited for the security guards who did not appear. In a letter to Dr. Thomson of October 21, Petitioner complained of this and further complained that her sick and annual leave had been applied toward the time she missed her classes while waiting for the security guards. During this period, Petitioner met all her orientation classes on the first floor of McGehee Hall.

On November 5, 1981, Petitioner notified Dr. Thomson that these experiences during the Fall academic quarter had been a physical hardship. She requested an assignment that would not require excessive walking up and down stairs.

Rather than move Petitioner's writing laboratory classes to the first floor of McGehee or to a building with an elevator, or move the writing lab itself to a more accessible location for any handicapped person, Dr. Thomson scheduled Petitioner's freshman orientation classes on the second floor of Patterson. Thus, in disregard of Petitioner's request and physician's verification letters, in December 1982, all of Petitioner's classes were moved to the second floor of Patterson Hall, a building unequipped with an elevator.

Perceiving a failure on the part of University officials to provide reasonable accommodation for Petitioner's handicap, Petitioner filed suit in the U.S. District Court alleging violations of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964, the fourteenth Amendment to the United States

Constitution, and the common tort law of Alabama.[5]

On January 28, 1983, the Court issued an opinion dismissing the Defendant Alabama State University. The Court concluded that "there is no evidence that the State or the University consented to a suit against it." App. D at 24.

A jury trial ensued against the remaining Defendants on Petitioner's claims that the refusal of the State University to provide reasonable accommodation and the moving of the orientation class was an infliction of emotional distress on violation of the common law of Alabama. On August 31, 1983, the jury returned a verdict absolving the remaining defendants of tort law violations.

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[5]Petitioner alleged that the refusal to make the accommodation amounted to an infliction of emotional distress.

After the jury verdict, the District Court issued another opinion dismissing the Rehabilitation Act claim. Reviewing the evidence that had been put forth at trial, the court found that "there is no reason why Orientation cannot be taught in any classroom not otherwise occupied on the campus." App.C at 6. However, the court found that Petitioner was not entitled to relief under §504 because she had not shown that the university had intentionally discriminated against her as required by City of Mobile v. Bolden 446 U.S. 55 (1980) and because Petitioner's request was for a form of "affirmative action" which the University was not obligated to provide for by reason of Southeastern Community College v. Davis, 442 U.S. 397 (1979).

The Eleventh Circuit affirmed the District Court in a per curiam opinion and denied a petition for a rehearing.

REASONS FOR GRANTING THE WRIT

This case raises the question of whether a handicapped university teacher who has been clearly and undeniably affected because of an employer's refusal to provide reasonable accomodation can be denied relief under §504 of the Rehabilitation Act because of a failure to establish discriminatory intent as this Court required in voting rights cases in City of Mobile v. Bolden, 446 U.S. 55 (1980). This Court went a long way toward answering that question in the recent decision of Alexander v. Choate, ___U.S. ___, 53 L.W. 4072 (1985).

In a unanimous opinion, the Court read the legislative history of §504 as indicating a congressional realization that much discrimination against the handicapped is "often the product not of invidious animus, but rather of thoughtlessness and indifference of

benign neglect." Alexander, supra. ___U.S. at ___ ; 53 L.W. at 4074. Moreover, the Court recognized that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by discriminatory intent." Alexander, supra, __ U.S.__ at 53 L.W. at 4074. Nowithstanding the Court's conclusion that Congress did not require plaintiffs suing under §504 to establish discriminatory animus, the Court refused to find that Congress "intended §504 to embrace all claims and disparate discrimination." __ U.S.__ 53 L.W. at 4075. (Emphasis supplied.)

The Court therefore established the following guideposts that must be utilized in analyzing claims under ¶504:

> "Any interpretation of §504 must therefore be responsive to two powerful but countervailing considerations -- the need to

> give effect to the statutory objectives and the desire to keep §504 within manageable bounds."

Id.

After considering the facts of Alexander, this Court concluded that the state imposed 14-day limitation on in-patient Medicaid treatment that was alleged to violate §504 did not fall within the compass of the Rehabilitation Act. As the Court stated:

> The 14-day limitation will not deny respondents meaningful access to Tennessee Medicaid services or exclude them from those services. The new limitation does not invoke criteria that have a particular exclusionary effect on the handicapped; the reduction, neutral on its face, does not distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having.

___U.S. at ___, 53 L.W. at 4075.

In other words, the 14-day rule challenged in Alexander had an impact upon the handicapped; the impact however was not considered discriminatory. In this case the question is whether a policy or decision that undeniably has a discriminatory effect upon a handicapped person under §504 and its implementing regulations can withstand challenge because the petitioner has failed to show that the decision was motivated by discriminatory animus.

Petitioner below was effected by the decisions of the defendants in two respects. In the first instance, the decision to move the orientation class from the first floor, where it had previously been taught, to the second floor with the knowledge that petitioner had a

leg handicap, made it extremely difficult for her to continue to meet with her classes. Secondly, the refusal to move the writing lab from the second floor to the first floor exacerbated her hardship by requiring that she climb stairs for an additional set of classes. If the decision below is allowed to stand it will eviscerate the meaning of Alexander and continue the confusion which characterized the decisions in this area before Alexander was decided.[6]

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[6]Of course, a strong argument could be made that even without the decision in Alexander the lower courts would have to be reversed since their decisions were out of line with decisions in the Eleventh Circuit and elsewhere which upheld §504 claims that were based on discriminatory impact alone. The cases which would support such an argument are cited in Alexander, __ U.S. __ n.17, 53 L.W. 4074 n. 17.

Since this Court in Alexander recognized that most other circuits were moving toward an impact standard, Petitioner is at the minimum entitled to a trial which would allow for the trial judge to reconsider in light of Alexander.[7].

The lower court also concluded that Petitioner was not entitled to relief on her claims because it felt she was asking for "affirmative action". App. C at 20. Reading this

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[7]The trial court went so far as to rely on City of Mobile v. Bolden, 446 U.S. 55 (1981) to support its holding that petitioner must establish discriminatory animus under §504. Not only is Bolden wholly inapplicable in that it is a voting case which does not raise handicap issues, but in addition that decision was altered by Congressional passage of the Voting Rights Act Amendments of 1982, P.L. 97-205, 96 Stat. 131 which makes clear that in §2 voting rights cases plaintiffs need not establish discriminatory motivation.

Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979) as authority for the proposition that recipients of federal funds under §504 are not required to provide "affirmative action" to handicapped individuals alleging discriminatory treatment, the court dismissed the action. However, the minimal nature of the accomodation sought by the Petitioner, and the finding of the court below that "there is no reason why orientation could not be taught in any classroom not otherwise occupied on the campus" (App. C at 6) indicates that the court below felt that Southeastern removed all affirmative responsibilities toward the handicapped. In the lower court's mind, §504 defendants are prohibited from discriminating, but

they are not required to make any changes that are not the consequence of intentional discrimination.

This Court's opinion in Alexander makes clear that the reading of Southeastern adopted by the District Court is incorrect. The Alexander court stated:

> Regardless of the aptness of our choice of words in Davis, it is clear from the context of Davis that the term affirmative-action referred to those 'changes', 'adjustments', or 'modifications' to existing programs that would be 'substantial' or that would constitute 'fundamental' alteration[s] in the nature of a program rather than to those changes that would be reasonable accomodations.

Alexander, ___ U.S. at N.20; 53 L.W. at 4075 n.20 (citations omitted). The trial court could not have reached its conclusion below if it had the benefit of this clarification of §504. That court should therefore be required to

undertake a new review to consider whether the accommodation requested by Petitioner was a "substantial" change rather than a "reasonable" one.[8]

An additional issue that must be decided by this Court is whether the District Court erred in dismissing the suit against the University on the ground that there was "no evidence that the state or A.S.U. consented to suit against it." App. D at 24. In so holding, the Court thereby eliminated federally funded state universities

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[8]As the Court made clear in Alexander, "the regulations implementing §504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must be made to assure meaningful access." Alexander, supra at n. 21. At no point did the lower court consider whether the regulations could be construed to require more than §504.

from coverage of §504, a decision that will remove the benefits of the Act from the handicapped teachers who either teach or seek jobs at these institutions and, more importantly, will eliminate from coverage of the Act thousands of handicapped state university students who each day face practices that are neutral in form and intention, but which seriously impede their access to the nation's state supported university system. In its interlocutory opinion, the Court did not inquire whether Congressional passage of §504 was an exercise of its power under the Fourteenth Amendment to override state sovereign immunity. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). As this Court is aware, a recent Court

of Appeals decision concludes that Congress did pass §504 under the authority of that amendment. See Atascadero State Hospital v. Scanlon, 735 F.2d 359 (9th Cir.), cert. granted, ___ U.S. ___, 105 S.Ct. 503 (1984). Because the impact of removing state universities which receive federal funds from coverage of §504 by reason of the Eleventh Amendment will have an impact equal to if not greater than removing state supported hospitals, this Court should grant certiorari to determine whether Congress meant to exclude these institutions from the restrictions imposed by §504.

CONCLUSION

For the foregoing reasons, the Court should issue the writ of certiorari to the Court of Appeals for the Eleventh Circuit and set the case for oral argument or, in the alternative, grant the Writ for Certiorari and vacate the decisions of the lower courts and remand for reconsideration in light of Alexander.

Respectfully submitted,

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** Counsel for Petitioner wish to express their appreciation to Elsie Chandler and Ruth Cooper, law students at Rutgers School of Law, Newark, New Jersey, for their work on this Petition.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7544

GWENDOLYN M. PATTON,

Plaintiff-Appellant,

versus

ROBERT POLK THOMSON, ETC., and
WILLIAM S. EDMONDS, ETC.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION FOR REHEARING

(October 12, 1984)

Before HILL and HENDERSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the Petition for rehearing filed in the above entitled and numbered cause be and the same is

hereby denied.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

*Honorable John Minor Wisdom, U.S. District Judge for the Fifth Circuit, sitting by designation.

(Rev. 6/82)

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7544

GWENDOLYN M. PATTON,

Plaintiff-Appellant,

versus

ROBERT POLK THOMSON, etc., and WILLIAM S. EDMONDS, etc.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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(August 20, 1984)

Before HILL and HENDERSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

PER CURIAM:

A F F I R M E D. See Circuit Rule 25.

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*Honorable John Minor Wisdom, U.S. District Judge for the Fifth Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GWENDOLYN M. PATTON,

Plaintiff,

vs. CIVIL ACTION
No. 82-638-N

ROBERT POLK THOMSON,
Etc.; et al,

Defendants

OPINION

This cause is submitted upon evidence taken in open Court on the question of whether or not Dean Thomson and Vice-President Edmonds of Alabama State University violated 29 U.S.C. §794 in failing to provide first-floor classroom accommodations for Plaintiff-Instructor Patton, who has a disability in that her doctor has indicated that excessive climbing of stairs could be detrimental to a leg

condition[1] resulting from an accident which happened several years prior to the other pertinent facts in this case. The parties agreed that another count in the complaint seeking damages be tried with this court and that the jury would consider the damage suit claim while this Court would consider this the equitable claim.

Plaintiff Patton, an instructor in Orientation and Writing Lab, has made a number of requests seeking to obtain full-time classroom space on the first

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[1]That leg condition was brought to the special attention of the Defendants in October, 1981, when Plaintiff suffered temporary additional disability resulting from an operation on the leg. It is difficult to determine whether Plaintiff originally complained of temporary or permanent disability in use of stairs (see Plaintiff's Exhibits 7,8,9; contra Plaintiff Exhibit 36) and whether her doctor reported a permanent condition (Plaintiff's Exhibit 31).

floor of a building so that climbing steps would not be necessary to her teaching. Orientation is a class given to first quarter students who need help in determining their future plans for their education in college and is primarily associated with the first quarter, being the fall quarter of the freshman year. There is no reason why Orientation cannot be taught in any classroom not otherwise occupied on the campus. Plaintiff was originally scheduled for teaching of Orientation on the first floor of McGehee Hall, but was removed to the second floor of Patterson Hall where all of the classes in Writing Lab had been taught for some time.

Dr. Bibb, the original Director of the Writing Lab and the Chair of the Department under which the Writing Lab is taught, testified, as did others, to the reasons why Writing Lab should be taught

in one central location with all of the three instructors and the various student tutors working in the Writing Lab where visual aids, paper and other supplies are kept. Dr. Bibb testified that for several years he had been working to have all of the Writing Lab taught in one central location and that he opposed any changes which would take any part of the Writing Lab course away from that location (the second floor of Patterson Hall). Accordingly, Dr. Bibb recommended to Dean Thomson and Dr. Edmonds, and they all agreed, that Writing Lab should be taught in one central location for several reasons. Students to Writing Lab come either as assigned students to a registered course or as unscheduled volunteer students who need the aid of tutors and instructors in Writing Lab in preparation of various projects, and it is necessary that they know the permanent

location of the Writing Lab so as to facilitate their access thereto in the event of a temporary need. Dr. Bibb testified that he told Dean Thomson that Writing Lab was feasibly taught in only one place; that students not registered for the course but needing temporary writing help need to know where the lab is; that materials needed to be centrally located since, if some were in one place and some in another, there would necessarily be shortages occurring between the two locations; and that there should be central clearance for a sharing of responsibility for obtaining materials and for instruction of the various students coming in. Dr. Bibb stated that he had experienced these difficulties on prior occasions when Writing Lab was not so centralized. He testified further that, ideally, Writing Lab requires interaction between the instructors, the

tutors and the students because there are some joint efforts and some individual efforts but that his primary objection was the confusion to the students who voluntarily come to Writing Lab without having it scheduled and that they need to know the permanent location of the Writing Lab. Dr. Bibb testified that Plaintiff was an excellent instructor in Writing Lab and that he would think that she would have been an excellent instructor in Orientation and that the same overriding considerations for not moving the Writing Lab classes assigned to Plaintiff do not apply to the moving of the Orientation classes which can be taught separately by separate instructors. Dr. Bibb's opposition to the moving of part of the Writing Lab class was accepted and honored by both Dean Thomson and Dr. Edmonds, who then

sought to make other arrangements to seek to accommodate Plaintiff.

During a period of Plaintiff's acute problem in October, 1981, Plaintiff had an operation on her leg and was unable to ascend or descend the stairs for a matter of several days. Although the matter arose during a school term and it was necessary to inform all students that Plaintiff's classroom in Orientation would be removed to the second floor of Patterson Hall, whereon the Writing Lab classes were held, Dean Thomson and Dr. Edmonds agreed that this was a practical solution so as to avoid the necessity of excessive ambulation during the period of time when Plaintiff was incapacitated in the use of one leg as a result of the operation. Additionally, Dean Thomson made arrangements for two security officers to come in and take Plaintiff bodily in her wheelchair up and down the

stairs for at least one entrance and departure each day so that she would not have to climb the stairs. This arrangement was not precleared with Plaintiff because Dean Thomson, in considering the matter, felt that he should be sure that Security, not being employed to do such functions, would be willing to accept the responsibility of so transporting Plaintiff physically, and upon having made this arrangement, Dean Thomson offered the same to Plaintiff. Plaintiff, without telling Dean Thomson that she would not accede to such treatment, endured several trips, and there were several misunderstandings arising therefrom. Those misunderstandings were conveyed to Dean Thomson and Dr. Edmonds after Plaintiff had been using the stairs unassisted for several days.

Dean Thomson had asked Plaintiff to notify him of any problem and not until some weeks later did Dean Thomson or Dr. Edmonds get word directly of the problems that Plaintiff had. On the first day that she was to be transported by security guards, Dean Thomson went to the stairs where the transportation would be made, and Plaintiff asked him what she would do about lunch, and he told her that he hoped she brought her lunch, and then she asked him what she was to do in case of fire, and he reminded her that her problems were causing everyone a great deal of trouble. Obviously, Dean Thomson had gone to considerable trouble to get Security to do something that they were not employed to do and to make arrangements for the change of class locations of Orientation so that all of Plaintiff's classes could be lodged on one floor. As hereinafter set out, the

Plaintiff had refused to take sick leave as suggested by Dean Thomson while she was in the wheel chair.

Mrs. Williams, the Supervisor of the Writing Lab from January, 1981 through May, 1982, testified that she had no particular objection to Plaintiff's teaching the Writing Lab class at another location but that she recognized there might be problems and that one potential problem was that transferring materials back and forth would be troublesome and would possibly cause a time loss in affording proper instruction to students. Mrs. Williams felt that she was not experienced enough in Writing Lab to pass on the question, and she, therefore, suggested that the matter be taken up with her superior, Dr. Bibb. Mrs. Williams recalled one occasion when Plaintiff had taken materials for the Writing Lab to her car and had caused a

resulting shortage in the regular lab in those materials.

A number of different proposals were made to accommodate Ms. Patton without splitting the Writing Lab. When Plaintiff first approached Dean Thomson or Dr. Edmonds about making special arrangements for her to have classes on the ground floor because she could not climb stairs on a temporary basis at about the time of the operation, it was suggested that Plaintiff take sick leave until she was able to ascend and descend the stairs. Plaintiff was unwilling to do this because she felt that it would unfairly encroach upon her sick and annual leave time. The suggestion that Ms. Patton be assigned full-time Orientation was discarded, and the Defendants have offered a preponderance of the evidence showing that there was no place for a full-time Orientation teacher

since there was and is very little demand for the subject after the first quarter.

One of the suggestions that Plaintiff made to relieve her problem was that she be allowed to teach Writing Lab in the ladies' lounge. Mrs. Williams testified that, on one occasion, one tutor had taken a group of students, male and female, into the ladies' lounge and that their presence there had been undesirable because of the nature of the purpose of the ladies' lounge and that Mrs. Williams had ordered that practice terminated at once.

As an alternative, Plaintiff requested a transfer so that her classes would be in English and/or in Political Science. However, Plaintiff was not academically qualified to teach either of these subjects in college. Plaintiff's primary educational background centered in an ability to teach secondary

educational courses and there were and have to this day been no vacancies in secondary education. At one time, Dean Thomson suggested to Plaintiff that she might consider seeking a transfer to another department or facility where her qualifications might be more in demand. Plaintiff felt that that suggestion was a personal reference to her ability to get along with Dean Thomson and others at Alabama State University and not made in good faith. The preponderance of the evidence does not justify such a conclusion.

Before suggesting that the temporary accommodations for Plaintiff be made, such as the moving of the Orientation classroom to the second floor of Patterson Hall, the arrangements for security personnel to carry Plaintiff up and down the stairs, Dean Thomson, President Levi Watkins [then President of

the College], Dr. Alfred Smith, Dr. Edmonds and Colonel Holloway [the Director of Personnel] had conferred several times about the matter and finally conferred with counsel for the Alabama State University, and all agreed that Dean Thomson's suggestion of removal of the Orientation classes of Plaintiff to the second floor of Patterson Hall and transportation of her up and down the stairs was the most appropriate accommodation that could feasibly be made for Plaintiff's problem. Counsel for the University advised that the matter did not violate any law and that he saw no reason why it should not be implemented.

This Court has found no authority as to the weight of a defense of advice of counsel but is of the opinion that, unlike the absolute defense of advice of counsel in malicious prosecution suits,

the effect of having secured in a bona fide manner the advice of counsel in a suit for discrimination against the handicapped is a matter which goes merely to the question of intent and the reasonableness of the decision.

The Court then turns to the question of whether or not a disparate intent is a necessary element of the offense of discrimination against the handicapped. For many years, courts wrestled with the problem, and it appeared that, in the old Fifth Circuit, courts did not require a discriminatory intent as an element of a civil rights violation involving discrimination on the basis of race or religion. However, the Supreme Court in Bolden v. City of Mobile, 446 U.S. 55, pointed out clearly that disparate intent or discriminatory intent was a necessary element of a civil rights violation involving race discrimination.

However, a more compelling reason for denying relief to Plaintiff under 29 U.S.C. §794 is suggested by the Supreme Court in Southeastern Community College v. Davis, 442 U.S. 397, 407-412. The Court distinguished § 504 of the Act, 29 U.S.C. §794, affording no affirmative action program in cases such as we now consider, and § 501 of the Act, 29 U.S.C. § 791, requiring federal government employers in various degrees to implement an affirmative action program for the handicapped, and concludes as follows:

> Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so." At pp. 410-411.

That Court recognized that situations may yet arise where an arbitrary refusal to modify an existing program might become

unreasonable and, therefore, discriminatory.

This Court finds that affirmative action on the part of Alabama State University was not required in this situation and that the various solutions of Plaintiff's problems considered or attempted by the officials of the University indicate that its consideration of this matter was neither arbitrary, unreasonable nor discriminatory.

Judgment will be entered in accordance with this Opinion and with the verdict of the jury on the other count of the complaint.

DONE this 15th day of September, 1983.

R.L. VARNER

UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GWENDOLYN M. PATTON,)
)
Plaintiff,)
)
vs.)
)
ROBERT POLK THOMSON, Etc.; ET AL,)

CIVIL ACTION NO. 82-638-N

O R D E R

In accordance with the Opinion entered in the above-styled cause on this date, it is ORDERED by this Court:

1. That Plaintiff's complaint be, and the same is hereby, dismissed as to Alabama State University, and Alabama State University is hereby dismissed as a party Defendant to this cause of action;

2. That Plaintiff's claims under 29 U.S.C. §793 are hereby dismissed; and

3. That Plaintiff's request for monetary relief under 42 U.S.C. §794 is hereby dismissed.

DONE this 28th day of January, 1983.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ABABAMA
NORTHERN DIVISION

GWENDOLYN M. PATTON,

Plaintiff,

vs.

ROBERT POLK THOMSON, Etc.; ET AL,

Defendants.

CIVIL ACTION NO. 82-638-N

OPINION

This cause is now before the Court on the Defendants' motions to dismiss filed herein October 19, 1982.

Alabama State University (ASU) contends that, as an agency or instrumentality of the State of Alabama, it is immune from suit pursuant to and in accordance with the Eleventh Amendment to the Constitution of the United States and Article I, Section 14, of the Constitution of Alabama, 1901.

The Eleventh Amendment has long been held to bar an action in federal court

against a State or State agency unless the State has consented to suit. Ford Motor Co. v. Department of Treasury of the State of Alabama, 323 U.S. 459 (1944); Alabama v. Pugh 438 U.S. 781 (1978). The amendment bars suits, not only against the State when it is named party, but also when it is the real party in fact. Scheuer v. Rhodes, 416 U.S. 232 (1974). As to whether the real party in fact is the State, the federal court must look to the law of the appropriate State for guidance. Ford Motor Co, supra. In Alabama, a suit against a State university is a suit against the State. Massler v. Troy State University, 343 So.2d 1 (Ala. 1977). This Court can find no evidence that the State or ASU consented to a suit against it. Therefore, it is the opinion of this Court that Plaintiff's complaint should be dismissed as to ASU.

Defendants argue that all claims brought under 29 U.S.C. §793 should be dismissed because there is no private right of action under that statute. The United States Court of Appeals for the Fifth Circuit has held that §793 does not imply that handicapped persons have a direct private right of action to redress discrimination based on handicap. Rogers v. Frito-Lay 611 F.2d 1074 (5th Cir. 1980), cert.den. 101 S.Ct. 246 (1980). It is the opinion of this Court that Plaintiff's claims under 29 U.S.C. §793 should be dismissed.

Defendants also seek to dismiss Plaintiff's claims made under 29 U.S.C. §794. Defendants argue that Plaintiff is required to exhaust administrative remedies prior to bringing this action in federal court. Title 42 U.S.C. §794(a)(2) provides that:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

Although there is administrative redress under Title VI, a private right of action may be maintained under §794 and exhaustion of administrative remedies is not a prerequisite to bringing such an action in federal court. Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980). However, Plaintiff's private right of action is limited to equitable relief. The remedies set forth in Title VI are made available to persons alleging discrimination under 42 U.S.C. §794. [42 U.S.C. §794a(a)(2)]. All forms of equitable relief are available to a private plaintiff suing under Title VI, but there is no authority to support the

proposition that a private right of action exists under Title VI for monetary damages. It is the opinion of this Court that a private plaintiff suing under 42 U.S.C. §794 should be dismissed.

An Order will be entered in accordance with this Opinion.

DONE this 28th day of January, 1983.

UNITED STATES DISTRICT JUDGE